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No. 03-574

IN THE

Supreme Court of the United States

CONSOLIDATED RAIL CORPORATION,
Petitioner,

v.

HONAS RICHARDS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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November 17, 2003

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MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae*. This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks leave to file a brief *amicus curiae* only when the case presents an issue of great significance to the railroad

[1] The letter expressing consent has been filed with the Clerk of the Court.

industry as a whole—and in those instances such requests have been granted.[2]

This case, arising under the Federal Employers' Liability Act (FELA), 45 U.S.C. §§51-60, presents such an issue. FELA, a federal negligence statute, takes the place of workers' compensation in the railroad industry. Because FELA litigation is an ongoing event for all major railroads—several thousand FELA suits are filed each year—AAR has a strong interest in assuring that lower courts do not improperly expand railroad liability under FELA. In this case, the court below relied on a prior decision of this Court improperly to expand railroad liability under FELA by abrogating the concept of proximate cause in cases where liability is premised on an alleged violation of a railroad safety statute. This holding, which is the product of a misapplication of a prior precedent of this Court, confers a serious and unwarranted disadvantage on railroad defendants in numerous cases arising under FELA.

When AAR participates as *amicus curiae* in a FELA case, it brings a broad, industry-wide perspective to the issue before the court. AAR works closely with its member railroads on a host of issues arising under FELA. AAR also maintains a close liaison with the National Association of Railroad Trial Counsel, an organization of over 900 attorneys representing railroads nationwide in personal injury litigation. Thus, AAR is thoroughly familiar with the trends and key issues that confront its members in FELA litigation.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling by bringing the perspective

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[2] *E.g., National Railroad Passenger Corp. v. Griesser*, 534 U.S. 970 (2001); *Kansas City Southern Ry. Co. v. Giddens*, 532 U.S. 990 (2001); *Metro-North Commuter R.R. v. Buckley*, 519 U.S. 958 (1996). All granting motion of AAR to participate as *amicus curiae*.

of the entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 77 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

One such matter is the Federal Employers' Liability Act (FELA), 45 U.S.C. §51-60, a 95 year old negligence statute under which railroad employees who are injured on the job may seek compensation from the employing railroad. Subsequent to FELA's enactment, every state enacted a workers' compensation law, under which the concept of assigning fault for workplace injuries is abandoned in favor of the principle that all employees suffering legitimate work-related injuries are deserving of compensation.[2] Despite the advent of workers' compensation, FELA remains intact, and each year thousands of FELA claims and lawsuits, like the case below, are asserted against AAR member railroads.[3] All told, the railroads spend close to a billion dollars annually in the payment and defense of claims brought under FELA. Thus, FELA litigation is an ongoing event for all major railroads, to which they devote substantial legal and financial resources.

This case is of great interest to AAR's members because the issue presented goes to the fundamental nature of FELA as a compensation statute. Despite admonitions from this Court that FELA does not make the employer the insurer of

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[2] Other than railroads, and the maritime industry, to which the substance of FELA applies by virtue of the Jones Act, 46 U.S.C. §688, all industries in the United States are covered by either state or federal no-fault workers' compensation systems. Most states enacted workers' compensation laws of general application between 1910 and 1920, with Mississippi being the last in 1948. Price V. Fishback and Shawn Everett Kantor, *The Adoption of Workers' Compensation in the United States*, 41 J.L & Econ. 305, 320 (1998).

[3] During the five year period from 1998 through 2002, nearly 25,000 FELA suits were filed. Data on railroads' FELA experiences are compiled from information provided to AAR by AAR members (and other railroads) in response to annual surveys.

its employees' safety and health, *Inman v. Baltimore & Ohio R.R.*, 361 U.S. 138, 140 (1959); *Ellis v. Union Pac. R.R.*, 329 U.S. 649, 653 (1947), numerous lower courts, typically in reliance on this Court's decision in *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500 (1957), interpret FELA otherwise. This case is a stark example of the tendency among some lower courts to erode the concept of negligence on which FELA is based, and is representative of what is commonly an overbroad and erroneous reading of *Rogers*. The impact of these decisions on FELA litigation cannot be understated.

The decision below is of great alarm to the nation's railroads because it serves to expand railroad liability under FELA beyond what was intended by the statute or any reasonable reading of this Court's precedents, causing it to resemble a no-fault compensation law. And, because unlike employers subject to workers' compensation, FELA defendants face uncapped liability in each and every case, the decision below foretells serious financial consequences for the nation's railroads. Therefore, this case is of utmost interest to AAR and its members.[4]

STATEMENT OF THE CASE

Amicus adopts the statement of the case in the Petition.

SUMMARY OF THE ARGUMENT

This Court should grant the petition in order to correct a serious misreading of this Court's prior precedent. The court below misread *Rogers v. Missouri Pac. R.R.*, which, properly

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[4] Under workers' compensation laws, compensation awards generally are based on a percentage of the claimant's average wages with a maximum limit. A. Larson & K. Larson, *Larson's Workers' Compensation Law* § 1.03[5] (2000 ed.). In contrast, FELA damages are uncapped. A FELA verdict will be deemed excessive only if it "shocks the judicial conscience." *Schneider v. National R.R. Passenger Corp.*, 987 F.2d 132, 137 (2d Cir. 1993). ($1.75 million verdict, including over $1 million in intangible damages, not excessive).

read, does not have direct application to this case, while also ignoring another prior precedent that does. As a result, the court below held that the FELA eliminates the concept of proximate cause, badly misconstruing a federal law of unique importance to the railroad industry.

In *Davis v. Wolfe*, this Court held that railroads are not liable for violations of a safety statute where the violation is not the proximate cause of the injury, but only creates an incidental situation that ultimately results in the injury. Subsequently, in *Rogers* this Court held that where there is evidence suggesting more than one possible proximate cause of an injury, the case should go to the jury. *Rogers* and *Davis* addressed different issues, and the former never questioned the latter. Though it is applicable to this case, the court below paid no heed to *Davis*. Rather, it held that as interpreted by *Rogers*, the phrase "in whole or in part" in FELA requires abandonment of the *Davis* holding. However, since FELA's enactment this Court has consistently interpreted the statute to require a showing of proximate cause, and, contrary to the intimation of the court below, Congress has never modified the causation standard originally made part of the statute. Thus, lower courts remain obligated to apply that standard.

While some lower courts continue faithfully to apply the negligence and causation standards which Congress incorporated into FELA, the *Rogers* decision has been utilized by other courts to affect substantive changes to the law of negligence that go far beyond the specific modifications that Congress intended when it enacted FELA. As a result, in many jurisdictions FELA hardly resembles the statute Congress enacted in 1908. This Court should take the opportunity to clarify the *Rogers* holding to assure that lower courts properly interpret the FELA.

ARGUMENT

I. THE COURT BELOW MISINTERPRETED THIS COURT'S DECISION IN *ROGERS* TO ESTABLISH A CAUSATION STANDARD UNDER FELA THAT IS INCONSISTENT WITH CONGRESS' INTENT

> In a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the discovery of America and beyond. * * * But any attempt to impose responsibility upon such a basis would result in infinite liability for all wrongful acts, and would set society on edge and fill the courts with endless litigation.

Reed v. Pennsylvania R.R., 171 N.E.2d 718, 721 (Ohio 1961)(quoting Prosser on Torts (2d Ed. 1955); *see also, Johnson v. Chicago Great Western Ry. Co.*, 64 N.W.2d 372, 377 (Minn. 1954). Although a physicist might claim that knowing the current state of the universe will allow one to trace events back to the beginning of time (and infinitely into the future), the law traditionally has rejected this deterministic view of the world as a basis for establishing rules for imposing liability for an actor's negligent conduct. Instead, for legal liability to attach, a sufficiently close nexus must be established between the conduct and the harm. RESTATEMENT (SECOND) OF TORTS §431 (1965). Consistent with this principle, Congress intended to incorporate this more bounded concept of legal "cause and effect" when it enacted FELA. In fact, a clear causation rule which applies in the circumstances presented in this case has been establish by this Court. *Davis v. Wolfe*, 263 U.S. 239 (1923). Nonetheless, the court below ignored that precedent, opting instead to add to a line of cases that have served to move FELA ever closer to being a workers' compensation statute which, for better or worse, is contrary to Congress' intent in enacting FELA. Like many of those other lower court decisions, the decision below is grounded in an expansive and

erroneous reading of this Court's decision in *Rogers v. Missouri Pac. R.R.*

A. Though FELA Expressly Modified Some of the Then Prevailing Features of the Common Law, It Retained the Fundamental Principles of the Law of Negligence

In 1908, before the concept of no-fault workers' compensation had gained a foothold in the United States, Congress enacted FELA as a tort-based remedy for railroad employees injured on the job, who, at that time, had little legal recourse. This was an era when working in the railroad industry was undoubtedly hazardous, and resulted in a great human toll.[5] Moreover, the common law of negligence had erected a number of often insurmountable barriers as obstacles to recovery for injuries sustained by workers.[6]

Against this backdrop, and with the goal of providing a progressive and meaningful remedy, Congress enacted FELA, initially in 1906, and, after addressing constitutional flaws in the original statute, again in 1908.[7] Through FELA, Congress sought to address the perils posed by railroad employment and to provide compensation to employees who suffered injury or death as a result of that employment. *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 542 (1994).

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[5] In the year ending June 30, 1907, 4,534 rail workers were killed on the job and 87,644 were injured. Interstate Commerce Commission, *Statistics of Railways in the United States 1908*, 41, 99 (1909).

[6] Any contributory negligence by the plaintiff usually barred recovery. *E.g., Farwell v. Boston & Maine R.R.*, 4 Metc. 49 (Mass. 1842). Recovery also was denied if the worker knew the inherent dangers of a job and assumed those risks by accepting employment. *E.g., Clark v. St. Paul & Souix City R.R.*, 9 N.W. 581 (1881); *Gibson v. Erie Ry. Co.*, 63 N.Y. 449 (1875).

[7] *Howard v. Illinois Cent. R.R.*, 207 U.S. 463 (1908); *Second Employers' Liability Cases*, 223 U.S. 1 (1912).

When it enacted FELA, Congress adopted what was at the time the universal compensation model in the United States: the law of negligence. The fundamental policy embodied in FELA was that railroads were to be liable in damages for injuries sustained by employees in the course of their railroad employment when such injuries were caused by the negligence of the railroad. However, to ameliorate the harsh results which often were a consequence of prevailing legal doctrine, Congress modified some aspects of the existing common law in an effort to promote recovery. The defenses of contributory negligence, assumption of the risk and the fellow servant doctrine were all eliminated by FELA. 45 U.S.C. §§ 53 and 54; *see also Chesapeake & Ohio Ry. Co. v. De Atley*, 241 U.S. 310, 313 (1916). FELA was an early example of a comparative fault statute. Rather than barring recovery if the employee's negligence contributed to the injury, under FELA damages are reduced in proportion to the employee's negligence. 45 U.S.C. § 53. Notwithstanding these express departures from the common law, it is indisputable that Congress envisioned that the remedy available under FELA would be consistent with the common law concept of negligence, a principle that has consistently been recognized by this Court.[8]

Both prior and subsequent to FELA's enactment Congress enacted railroad safety statutes, and delegated to federal regulatory agencies–first the Interstate Commerce Commission and then the Department of Transportation–authority to

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[8] In *Southern Ry. v. Gray*, 241 U.S. 333 (1916), this Court observed that the rights and obligations under FELA "depend upon applicable principles of common law. . . . Negligence by the railroad is essential to a recovery." *Id.* at 339. Where Congress did not specifically alter the common law, the employee's remedy was to be consistent with common law principles. *Gottshall*, 512 U.S. at 543-44 (1994); *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429 (1997).

promulgate railroad safety regulations.[9] Although they do not confer a right of action on injured employees, the SAA and LIA are substantively, if not in form, amendments to FELA. *Urie v. Thompson*, 337 U.S. 163, 188-89 (1949). Violation of these statutes constitutes negligence as a matter of law in personal injury lawsuits brought under FELA. *Urie*, 337 U.S. at 189; *O'Donnell v. Elgin, Joliet & E. Ry. Co.*, 338 U.S. 384, 390 (1949); *Philadelphia & R. Ry. Co. v. Auchenbach*, 16 F.2d 550, 552 (3rd Cir. 1926); *Davis v. Hand*, 290 F. 73, 75 (8th Cir. 1923). In addition, violation of a safety statute renders any employee contributory negligence irrelevant. 45 U.S.C. § 53.

Although the railroad safety statutes impose an absolute duty on railroads, just as is the case with liability for negligent conduct under FELA, liability for a safety statute violation attaches only if there is a causal connection between the violation and the complained of injury. *Carter v. Atlanta & St. Andrews Bay Ry.*, 338 U.S. 430, 434-35 (1949). For nearly half a century after FELA's enactment, this Court issued a number of decisions confirming that the applicable causation standard under FELA is proximate cause. *See* cases cited in Pet. at 10, n. 4. Additionally, several decisions of this Court issued shortly after FELA's enactment addressed the

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[9] *See* Safety Appliances Act of 1893 (SAA), c. 196, 27 Stat. 531 (now codified at 49 U.S.C. § 20301, *et seq.*); Boiler Inspection Act, c. 103, 36 Stat. 913 (now known as the Locomotive Inspection Act (LIA), and codified as amended at 49 U.S.C. §§ 20701-20703); Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 49 U.S.C. § 20101, *et seq.* In 1966, when the Department of Transportation (DOT) was established, authority for implementing railroad safety laws enacted by Congress, originally a function of the Interstate Commerce Commission, was delegated to the Federal Railroad Administration (FRA), an agency within DOT. Department of Transportation Act, Pub. L. No. 89-670, § 6(e), 80 Stat. 931.

circumstances under which the requisite causal connection exists between a safety statute violation and an injury. *See* cases cited in Pet. at 10.

Although the outcomes of these cases did not always appear consistent, this Court consistently held that a proximate causation standard applied. In *St. Louis & San Francisco R.R. v. Conarty*, 238 U.S. 243 (1915), this Court held that for strict liability due to a safety statute violation to apply, the injured employee had to be within the class of persons the statute's prescriptions were meant to benefit. *Id.* at 249. The Safety Appliances Act requires that all rail cars be equipped with couplers which couple on impact so as to avoid the need for employees to go between cars to couple and uncouple them. Where an employee was riding on the front of a locomotive which collided with a standing car that was missing a coupler, even though the presence of a coupler might have prevented the employee from being crushed, this Court reversed a finding of liability by the lower court, explaining that "[i]t is not claimed, nor could it be, under the evidence, that the collision was proximately attributable to a violation of [the SAA's automatic coupler] provisions, but only that, had they been complied with, it would not have resulted in injury to the deceased." *Id.* However, this Court further explained that "[n]othing in either provision [of the SAA] gives any warrant for saying that they are intended to provide a place of safety between colliding cars." *Id.* at 250. *See also Phillips v. Pennsylvania R.R.*, 283 F. 381 (7th Cir. 1922); *But cf. Louisville R.R. v. Layton*, 243 U.S. 617 (1917) (Liability found where employee preparing to release brake was thrown from a car after collision resulting from the failure of automatic couplers to work.)

Reconciling several prior opinions, in *Davis v. Wolfe* this Court set forth the principle by which lower courts are to determine whether a safety statute violation has a sufficient

causal connection to an injury so that liability for such violation applies without the need to prove negligence.

> [O]n the one hand, an employee cannot recover under the Safety Appliance Act if the failure to comply with its requirements is not a proximate cause of the accident which results in his injury, but merely creates an incidental condition or situation in which the accident, otherwise caused, results in such injury; and, on the other hand, he can recover if the failure to comply with the requirements of the Act is a proximate cause of the accident, resulting in injury to him while engaged in an operation in which the safety appliances are specifically designed to furnish him protection.

263 U.S. at 243. As petitioner points out, *Davis*, which confirmed the standard of proximate cause, has never been overruled or questioned by this Court.

Nonetheless, the only conclusion which may be drawn from the decision below is that the Sixth Circuit believes otherwise. Treating *Davis* as though it did not exist, but with frequent citation to and in reliance on *Rogers*, the court below overruled a prior Sixth Circuit decision factually similar to the case at bar. The court held that *Reetz v. Chicago & Erie R.R.*, 46 F.2d 50 (6th Cir. 1931), a case that followed *Davis*, "is no longer good law in light of *Rogers*." *Richards v. Consolidated Rail Corp.*, 330 F.3d 428, 437 (6th Cir. 2003). Consistent with the principle established in *Davis*, and in reliance on *Reetz*, the district court had held that "[p]laintiff's slip while walking the track was only incidentally caused by the alleged appliance violation" and "bears too tenuous a connection with the defective appliance so as to give rise to liability." *Richards v. Consolidated Rail Corp.*, 2001 WL 1681107 at *6 (S.D. Ohio 2001). The Court of Appeals, however, held that this tenuous connection did not preclude liability, a change in the law of the Sixth Circuit purportedly compelled by *Rogers*.

B. *Rogers* Neither Compels Nor Supports the Decision of the Court Below

Despite the meaning ascribed to it by many lower courts, a careful reading of *Rogers* reveals that it was not intended to usher in a new era of FELA litigation, in which all notions of proximate cause were to be disregarded. *See* Pet. at 13-17. The opinion in *Rogers* focused on the phrase "in whole or in part" which is contained in the provision of FELA establishing liability for railroad negligence. 45 U.S.C. § 51.[10] *Rogers* read this phrase to mean that Congress intended that a railroad could be found liable if its negligence was a cause, even if not the only cause, of the injury. And, *Rogers* held, in cases where the evidence reasonably lends itself to supporting more than one alternative cause, the jury is to have the opportunity to decide among them. "It does not matter that, from the evidence, the jury may also with reason, on the grounds of probability, attribute the result to other causes, including the employee's contributory negligence." 352 U.S. at 506. Thus, *Rogers* rejected an aberrant notion of proximate cause—requiring that the defendant's negligence be the "sole, efficient, producing cause of injury"—that prevailed in certain common law courts and that was inconsistent with this Court's causation precedents.

In the years following *Rogers*, many courts properly understood that decision to mean simply that if evidence is presented that might reasonably lead to differing conclusions as to the cause of an injury, or to the conclusion that multiple causes contributed to the injury, one among them railroad negligence, the case must go to the jury. *E.g., Ely v. Reading Co.*, 424 F.2d 758 (3rd Cir. 1970); *Funseth v. Great Northern*

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[10] "Every common carrier by railroad . . . shall be liable in damages to any person suffering injury [or death] while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence [of the carrier]." 45 U.S.C. § 51.

Ry. Co., 399 F.2d 918 (9th Cir. 1968). In *Ely*, the court interpreted *Rogers* to mean "that it is not a requisite that the employer's negligence be the entire cause of the accident." 424 F.2d at 762. Instead, the "jury must be instructed to consider that if the negligence of the defendant was one of the proximate causes of the accident, then liability exists." *Id.* In *Funseth*, the court explained that *Rogers* did not purport "to define causality other than to point out that, according to the plain and direct language of the statute, the negligence of the railroad need not be either the sole or the whole cause of the employee's injury" to support a finding of liability. 399 F.2d at 922.[11]

When this case reached the summary judgment stage it simply did not present a question which *Rogers* addresses. The evidence does not lend itself to a jury choosing among multiple possible legal causes of the injury: it is clear and undisputed that the plaintiff's fall on the ballast caused the injury (an event to which no railroad negligence has been attributable). Rather, the question is whether the alleged defect in the brakes–which simply began a chain of events that resulted in the plaintiff walking the track where he ultimately slipped on ballast–was the legal cause, in whole or in part, of the injury. As the district court properly recognized, this is a question to which *Davis* and *Reetz* are applicable.

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[11] *See also Pehowic v. Erie Lackawana R.R.* 430 F.2d 697 (3rd Cir. 1970)(If a jury could find among two reasonable alternative inferences, one of which could support liability, the jury should have that opportunity.); *Strobel v. Chicago, Rock Island and P. R.R.*, 96 N.W.2d 195 (Minn. 1959). ("It is elementary that the negligence of each of two or more actors's may be the proximate cause of an injury and that no actor's negligence ceases to be the proximate cause merely because it does not exceed the negligence of other actors." *Id.* at 200).

C. The Proximate Cause Standard of *Davis v. Wolfe* Remains the Law Today

As *Davis* made clear, when it enacted FELA, Congress did not intend to abrogate entirely the concept of proximate cause and to substitute the notion that any negligent act that can be linked to a chain of events ultimately resulting in an injury justifies a finding of liability. Moreover, no intervening events between the *Davis* and *Rogers* decisions call into question the continued validity of the former holding. The phrase "in whole or in part" has been part of the provision establishing a cause of action under FELA since the statute's enactment. And, Congress has taken no action to impel a reexamination of FELA, or to justify a judicial retreat from the common law concepts which Congress engrafted onto FELA in 1908.

What then accounts for the expansive interpretations of causation that courts have read into FELA? The court below suggested that *Rogers*' alleged abrogation of the *Davis/Reetz* standard of causation was a reaction to amendments to FELA enacted in 1939.[12] The *Rogers* opinion discussed the 1939 amendments, implying that they motivated this Court to undertake a supervisory role in assuring that conflicting evidence on causation be evaluated by the jury in virtually all cases. 352 U.S. at 509-10. However, *Rogers* never suggested that the 1939 amendments required a reexamination of the causation standard under FELA, for the simply reason that they did not.

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[12] "The *Rogers* Court adopted this relaxed standard in order to effectuate Congress' intent in amending FELA in 1939." 330 F.3d at 434. *See also Morrison v. N.Y. Cent. R.R.*, 361 F.2d 319 (6th Cir. 1966), stating that a charge to the jury on causation was consistent with 1939 amendments to FELA.

While the 1939 amendments were intended to ease the path toward recovery by FELA plaintiffs, they did not purport to address, let alone modify, the standard of causation. Adding a provision to section 1 of FELA, the 1939 amendments expanded the scope of FELA's coverage so that workers would no longer have to prove they were engaged directly in interstate commerce at the time they were injured in order to qualify for recovery under the statute. Act of Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.[13] In addition, in 1939, Congress amended FELA to eliminate the defense of assumption of the risk in all cases. *Id.*[14] The 1939 amendments also increased the statute of limitations under FELA from two to three years, *id.* at § 2, and prohibited railroads from establishing and enforcing rules which penalized employees for giving information concerning an accident to the injured person or his representative. *Id* at § 3. Tellingly, a railroad employees representatives did not believe that Congress had eliminated the need for employees to prove proximate cause when it enacted FELA in 1908, nor did he urge Congress to do so in 1939. In testimony before the House of Representatives, the General Counsel of the Brotherhood of Railroad Trainmen commented that it was unnecessary to add the word "proximately" to a provision of the act, explaining that such language would be "pure surplusage, because unless the

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[13] This amendment added the following language:

> Any employee of a carrier, any part of whose duties as such employee shall be in furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

[14] Previously, the assumption of the risk defense was eliminated only in cases where a safety statute had been violated.

negligence proximately caused the injury there can be no recovery."[15]

Inasmuch as the 1939 amendments to FELA did not address causation, the standard of causation under FELA at the time of the *Rogers* decision was identical to the standard originally intended by Congress in 1908, and interpreted by *Davis* and other cases of that era: what was insufficient causation to support liability in 1908 or 1923 was also insufficient in 1957 when *Rogers* was decided, or in 2003 when the court below issued its opinion. Thus, the court below misread the law when, on the basis of *Rogers*, it overruled *Reetz*, a case which simply followed and applied *Davis* and similar decisions of this Court.

II. THIS COURT SHOULD TAKE THE OPPORTUNITY TO CLARIFY ITS DECISION IN *ROGERS* BECAUSE LOWER COURTS CONTINUALLY HAVE RELIED ON *ROGERS* TO MAKE SUBSTANTIVE CHANGES TO FELA

In addition to resolving the deep conflict among the lower courts regarding the proper standard of causation, *see* Pet. at Part II, review of this case would provide an opportunity for this Court to clarify *Rogers*, as continued misinterpretations of that decision has become the basis for lower courts to announce substantive changes to FELA which depart markedly from Congress' intent.[16] The *Rogers* decision addressed only the question of causation, and at that, only the

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[15] *Hearings on H.R. 4988 and H.R. 4989 Before the Senate Comm. on the Judiciary*, 76th Cong., 1st Sess. (1939) (statement of Tom J. McGrath, General Counsel, Brotherhood of Railroad Trainmen).

[16] This Court has granted *certiorari* to address claims that the lower courts misconceived the meaning of a prior Supreme Court decision. *See e.g.*, *Wilkinson v. United States*, 365 U.S. 399 (1961).

question of submissibility to the jury.[17] However, the cumulative effect of lower court decisions that have read far more into *Rogers* has been drastically to change the landscape under which FELA cases are litigated.

Some courts have converted the *Rogers* holding from a test for a jury case to a substantive standard of causation on which the jury is to be instructed. *E.g., Oglesby v. Southern Pac. Transp. Co.*, 6 F.3d 603, 606-08 (9th Cir. 1993); *Page v. St. Louis Southwestern Ry. Co.*, 312 F.2d 84, 89-92 (5th Cir. 1963). Other courts, no doubt to effectuate FELA's humanitarian purposes, and through a subtle rearrangement of its language, have held that *Rogers* establishes a standard of care that differs qualitatively from ordinary negligence, that of "slight" negligence. "If the defendant's negligence, however slight, plays any part in producing plaintiff's injury, the defendant is liable". *Beeber v. Norfolk Southern Corp.*, 754 F.Supp. 1364, 1372 (N.D. Ind. 1990)(citing *Rogers*); *Walsh v. Consolidated Rail Corp.*, 937 F.Supp. 380, 382 (E.D. Pa. 1996)("FELA imposes a stringent duty of care. 'Slight negligence necessary to support a FELA action, is defined as a failure to exercise *great* care . . .'"); *Pry v. Alton & Southern Ry. Co.*, 598 N.E.2d 484, 499 (Ill. App. 1992) (Under FELA "[o]nly slight negligence of the defendant needs to be proved . .").

Despite numerous holdings by this Court and others that the standard of care under FELA is common law ordinary negligence, *Gottshall*, 512 U.S. at 543; *Tennant v. Peoria & P. U. Ry. Co.*, 321 U.S. 29 (1944),[18] under the influence of

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[17] "This Court granted certiorari to consider the question *whether the decision invaded the jury's function.*" 352 U.S. at 501. (emphasis supplied); "At best, uncertainty as to the facts arises from the petitioner's testimony, and in that circumstance not the court, *but the jury*, was the tribunal to determine the fact." *Id.* at 504. (emphasis supplied)

[18] *See Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331 (5th Cir. 1997), holding that the employer's duty of care under FELA is ordinary

Rogers lower courts have moved FELA closer to being a workers' compensation law and railroads to being insurers of their employees' health and safety. *Williams v. Long Island R.R.*, 196 F.3d 402 (2nd Cir. 1999)(The Second Circuit construes FELA "as creating a relaxed standard for negligence and causation." *Id.* at 406); *Cent. of Georgia v. Kelson*, 505 S.E.2d 803, 808 (Ga. App. 1998) (only slight negligence, defined as a failure to exercise *great* care, is necessary to support a FELA action). In *Ackley v. Chicago and North Western Transp. Co.*, 820 F.2d 263 (8th Cir. 1987), where the plaintiff's right to a jury determination resulted in an adverse outcome, FELA was interpreted to require that a new jury try again. Despite reference to the"emphasis to be placed on the jury's role under FELA," the court reversed a jury finding for the railroad, holding that it is improper to instruct the jury that a railroad may assume that its employees will exercise reasonable care. ("[D]uty to provide a reasonably safe place to work . . . is broader under [FELA] than a general duty of care." 820 F.2d at 267).

Various readings of *Rogers* also have muddied the concept of foreseeability under FELA. *Syverson v. Consolidated Rail Corp.*, 19 F.3d 824 (2nd Cir. 1994) (Holding that "under FELA and the case law construing it, the common-law negligence standards of foreseeability and causation normally applied in summary judgment are substantially diluted." *Id.* at 825); *Mitchell v. Missouri-Kansas-Texas R.R.*, 786 S.W.2d 659 (Tex. 1990) ("Foreseeability is thus not part of the causation standard as to negligence in FELA cases." *Id.* at 661). *But cf. Nivens v. St. Louis Southwestern Ry. Co.*, 425

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negligence, and recounting how courts had, over the years, (mis)-interpreted *Rogers* as establishing the concept of slight negligence. *Id.* at 335-38; *Fashauer v. New Jersey Transit Rail Operations, Inc.*, 57 F.3d 1269, 1283 (3rd Cir. 1995), holding that FELA incorporates the concept of ordinary negligence, and questioning whether the concept of "slight care" even exists in the law. *See also Peyton v. St. Louis Southwestern Ry. Co.*, 962 F.2d 832, 833 (8th Cir. 1992).

F.2d 114 (5th Cir. 1970), finding that while *Rogers* called for a "less demanding burden of proving causal relationship", nonetheless found that "foreseeability is 'an essential ingredient' of negligence under the Act." 425 F.2d at 118.

Nearly half a century after it was decided by this Court, *Rogers* has become a malleable tool which lower courts have utilized to implement what they believe are beneficial results from the standpoint of public policy, *i.e.*, assurance that rail employees suffering work-related injuries receive compensation. However, by enacting and retaining a negligence law, Congress chose not to provide assurances of recovery in all cases of job-related injuries in the rail industry.

In a revealing passage, one court described the state of adjudication under FELA, all but admitting that, despite protesting to the contrary, courts have amended FELA to make it resemble more a workers' compensation law than a tort statute (albeit one in which awards are not subject to the caps and limits that characterize true workers' compensation laws):

> Having accorded the customary, albeit somewhat psittacistic, deference to the non-insurer aspect of the FELA defendant, we will now proceed to discuss that statute as it is. Before doing so, we observe that while the FELA in its terms does not purport to border on a workman's compensation act, certain parallelism may be found. We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflect what was intended by the legislative branch then the change must be made there. The duty of this court is to follow what is now well-established authority.

Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243, 1246 (7th Cir. 1974). Notwithstanding this candid assessment of FELA jurisprudence, it remains the proper role of the courts faithfully to interpret a statute as Congress intended, not as they wish the statute to have been drafted, with the fallback

that the onus is then shifted to Congress to amend the statute if it is not happy with the interpretations given.

Although some courts continue to be faithful to Congress' intent,[19] to many lower courts, the elements of negligence under FELA blend together, imposing an overall "slight" burden on plaintiffs. This erroneous interpretation of FELA is so entrenched among many lower courts–with a consequent pronounced effect on FELA litigation–that liability is a foregone conclusion in many jurisdictions in all but a very few FELA lawsuits. Review of this case will provide this Court with a long overdue opportunity to clarify *Rogers* and thereby assure that federal and state trial and appellate courts no longer undertake an improper role in interpreting FELA.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[19] *See e.g., Williams v. Southern Pac. Transp. Co.*, 813 F.Supp. 1227, 1230 (S.D. Miss. 1992) ("A plaintiff need not establish that the defect was the sole cause of injury [citations omitted], as contributory proximate cause is sufficient."); *Chapman v. Union Pac. R.R.*, 467 N.W.2d 388, 395 (Neb. 1991) ("To recover under the Federal Employers' Liability Act, an employee must prove . . . that the alleged negligence is a proximate cause of the employee's injury.")